A

ABDUL KAHAR AHMAD

v.

KERAJAAN NEGERI SELANGOR DARUL EHSAN; KERAJAAN MALAYSIA & ANOR (INTERVENERS)

B

FEDERAL COURT, PUTRAJAYA
ABDUL HAMID MOHAMAD CJ
ZAKI TUN AZMI PCA
ZULKEFLI MAKINUDIN FCJ
C [APPLICATION NO: 1-2007]
22 MAY 2008

CONSTITUTIONAL LAW: *Courts - Jurisdiction of Federal Court - Determination of issue of Islamic law - Whether must be decided by*
D *Syariah Court instead of Federal Court - Federal Constitution, arts. 121(1A), 128(1)*

ISLAMIC LAW: *Jurisdiction - Syariah Court - Determination of issue of Islamic law - Whether must be decided by Syariah Court instead of*
E *Federal Court - Federal Constitution, arts. 121(1A), 128(1)*

One Abdul Kahar Ahmad was charged in the Syariah High Court of Selangor pursuant to ss. 7, 8(a), 10(b), 12 (c) and 13 of the Syariah Criminal Offences (Selangor) Enactment No. 9 of 1995 ('Enactment'). Since Abdul Kahar had failed to attend the Syariah
F High Court and the warrant of arrest issued by the court could not be executed, the case had not proceeded to trial. In the meantime, Abdul Kahar applied to this court for leave to issue a petition for a declaration that the said provisions of the Enactment were null and void. Leave was granted, and the Government of
G Malaysia and the Majlis Agama Islam Selangor were allowed to intervene. Abdul Kahar then filed the petition. Subsequently, the Majlis Agama Islam filed the instant notice of motion for the following orders: (i) that the issue of law – of whether the provisions of ss. 7, 8(a), 10(b), 12(c) and 13 of the Enactment
H and s. 49 of the Administration of the Religion of Islam Enactment (State of Selangor) No. 1 of 2003 are in accordance with the precepts of Islam as provided by para. 1, State List of the Ninth Schedule of the Federal Constitution ('FC') – must be decided by the Syariah High Court as provided by art. 121(1A)
I of the FC; and (ii) that all proceedings in this court be stayed until the issue had been disposed of by the Syariah High Court as provided by art. 121(1A) of the FC.

Held (dismissing the notice of motion)
Per Abdul Hamid Mohamad CJ delivering the judgment of the court:

(1) Nowhere in the Constitution is there a provision that the determination of Islamic law for the purpose of interpreting the FC is a matter for the State Legislature to make law to grant such jurisdiction to the Syariah Court. Hence, there is no such provision in the State Enactments to grant such jurisdiction to Syariah Courts. In fact, it cannot be done. On the other hand, item 4(k) of List I, Federal List of the Ninth Schedule, goes further to provide that "ascertainment of Islamic law and other personal laws for purposes of federal law" is a federal matter. Although reliance was placed on art. 121(1A) of the FC, it does not confer jurisdiction on Syariah Courts to interpret the FC to the exclusion of this court. That provision was inserted to avoid a situation as in *Myriam v. Ariff*, not to oust the jurisdiction of this court in matters that rightly belong to it. Before the jurisdiction of this court is excluded, it must be shown that the Syariah Court has jurisdiction over the matter first. That was not the case here. In fact, the FC provides to the contrary by virtue of art. 128(1). It was for this court, not the Syariah High Court, to decide, when hearing the petition, whether the impugned provisions are within the scope that the State Legislature has jurisdiction to make or not and whether they are valid or not. (paras 17, 18, 19 & 20)

Bahasa Malaysia *Translation Of Headnotes*

Seorang Abdul Kahar Ahmad telah dituduh di Mahkamah Tinggi Syariah Selangor dengan pertuduhan di bawah ss. 7, 8(a), 10(b), 12 (c) dan 13 Enakmen Kesalahan Jenayah Syariah (Selangor) No. 9 1995 ('Enakmen'). Oleh kerana Abdul Kahar tidak hadir di Mahkamah Tinggi Syariah dan waran tangkap yang dikeluarkan mahkamah gagal diserahkan ke atasnya, maka perbicaraan tidak dapat diteruskan. Sementara itu, Abdul Kahar memohon ke mahkamah ini untuk kebenaran mengeluarkan petisyen untuk mendapatkan perisytiharan bahawa peruntukan-peruntukan Enakmen yang berkaitan adalah tak sah dan batal. Kebenaran diberikan dan Kerajaan Malaysia serta Majlis Agama Islam Selangor telah dibenar untuk mencelah. Berikutnya, Abdul kahar telah memfail petisyennya. Majlis Agama Islam kemudian memfail

notis usul di sini untuk mendapatkan perintah-perintah berikut: (i) bahawa isu undang-undang – iaitu sama ada peruntukan ss. 7, 8(a), 10(b), 12(c) dan 13 Enakmen dan s. 49 Enakmen Pentadbiran Agama Islam (Negeri Selangor) No. 1 2003 selaras dengan ajaran Islam sepertimana yang termaktub di dalam perenggan 1, Senarai Negeri, Jadual Kesembilan Perlembagaan Persekutuan ('FC') – hendaklah diputuskan oleh Mahkamah Tinggi Syariah seperti yang diperuntukkan oleh art. 121(1A) FC; dan (ii) bahawa semua prosiding di mahkamah semasa hendaklah digantung sehingga isu ini diputuskan oleh Mahkamah Tinggi Syariah selaras dengan peruntukan art. 121(1A) FC.

Diputuskan (menolak notis usul)
Oleh Abdul Hamid Mohamad KHN menyampaikan penghakiman mahkamah:

(1) Tiada apa-apa peruntukan di mana-mana pun di dalam Perlembagaan yang menyatakan bahawa pemutusan undang-undang Islam bagi maksud pentafsiran FC adalah perkara yang diberikan kepada Badan Perundangan Negeri untuk membuatnya dengan memberikan bidangkuasa mengenainya kepada Mahkamah Syariah. Maka itu, tiada peruntukan sedemikian di dalam Enakmen-Enakmen Negeri yang memberikan bidangkuasa seperti itu kepada Mahkamah Syariah. Malah ianya adalah tidak boleh dibuat. Sebaliknya, item 4(k) Senarai I, Senarai Peersekutuan Jadual Kesembilan, pergi lebih jauh dengan memperuntukkan bahawa "penetapan undang-undang Islam dan lain-lain undang-undang diri bagi maksud undang-undang persekutuan" adalah satu perkara persekutuan. Walaupun pergantungan diletak kepada art. 121(1A) FC, ia tidak memberi bidangkuasa kepada Mahkamah Syariah untuk mentafsir FC dengan mengenepikan mahkamah ini. Peruntukan tersebut diselitkan bagi mengelakkan keadaan seperti yang berlaku di dalam *Myriam v. Ariff*, bukannya untuk menyingkir bidangkuasa mahkamah ini dalam perkara-perkara yang dengan sesungguhnya terhak kepadanya. Sebelum bidangkuasa mahkamah ini boleh disingkir, ianya terlebih dahulu hendaklah ditunjukkan bahawa Mahkamah Syariah mempunyai bidangkuasa terhadap perkara itu. Itu bukan keadaanya di sini. FC, malah, memperuntukkan sebaliknya melalui art. 128(1). Adalah menjadi tanggungjawab mahkamah ini, dan bukannya Mahkamah Syariah, untuk memutuskan, apabila mendengar petisyen, sama

ada peruntukan-peruntukan yang dicabar berada dalam skop di mana Badan Perundangan Negeri mempunyai bidangkuasa ke atasnya ataupun tidak dan sama ada ianya sah ataupun tidak.

Case(s) referred to:

Latifah Mat Zin v. Rosmawati Sharibun & Anor [2007] 5 CLJ 253 FC ***(refd)***

Myriam v. Ariff [1971] 1 MLJ 265 ***(refd)***

Legislation referred to:

Administration of Islamic Law Enactment (Selangor) No 1 of 2003, s. 49

Federal Constitution, arts. 121(1A), 128(1)

Syariah Criminal Offences (Selangor) Enactment No 9 of 1995, ss. 7, 8(a), 10(b), 12(c), 13

For the applicant - Malik Imtiaz (Edmund Bontai Soon, Syamsuriatina Ishak with him); M/s Chooi & Co

For the 1st respondent - Datin Paduka Zauyah Be Loth Khan SLA Selangor (Aimi Hajar Mohamad Ridzwan ALA with her)

For the 2nd respondent - Mubashir Mansor (Abdul Rahim Sinwan & Abdul Halim Bahari with him); M/s Azra & Assoc

For the intervener - Azizah Nawawi SFC (Mahamad Naser Disa SFC)

Reported by Suresh Nathan

JUDGMENT

Abdul Hamid Mohamad CJ:

[1] For the sake of clarity, I shall refer to the parties in their respective names and state the events in chronological order.

[2] Abdul Kahar bin Ahmad ("Abdul Kahar") was charged in the Syariah High Court of Selangor ("the Syariah High Court") with five counts briefly stated as follows:

First Charge

[3] For expounding the doctrine contrary to Islamic Law under s. 7 of the Syariah Criminal Offences (Selangor) Enactment No. 9 of 1995 ("Enactment No. 9 of 1995").

A **Second Charge**

[4] For stating, claiming and declaring himself as a Malay prophet of this era under s. 8(a) of Enactment No. 9 of 1995.

B **Third Charge**

[5] For ridiculing the practices relating to the religion of Islam under s. 10(b) of Enactment No. 9 of 1995.

Fourth Charge

C **[6]** For defying and disobeying the lawful orders or directions of the Mufti, expressed or given by way of a fatwa under s. 12(c) of Enactment No. 9 of 1995.

Fifth Charge

D **[7]** For disseminating opinions concerning an issue contrary to Islamic Law and fatwa for the time being in force in the State under s. 13 of Enactment No. 9 of 1995.

E **[8]** As Abdul Kahar had failed to attend the Syariah High Court and the warrant of arrest issued by the court could not be executed, the case had not proceeded to trial. In the meantime, Abdul Kahar made an application to this court praying for leave to issue a petition for a declaration that the said provisions of the F State Enactments are null and void. Leave was granted by this court. The Government of Malaysia and the Majlis Agama Islam Selangor ("Majlis Agama Islam") were allowed to intervene.

[9] Abdul Kahar then filed the petition. Subsequently, the Majlis Agama Islam filed the instant notice of motion (encl. 35(a)) for the G following orders:

[10] First, for an order that the issue of law whether the provisions of ss. 7, 8(a), 10(b), 12(c) and 13 of the Syariah Criminal Law Enactment (Selangor) No. 9 of 1995 and s. 49 of H the Administration of the Religion of Islam Enactment (State of Selangor) No. 1 of 2003 are in accordance with the precepts of Islam as provided by Paragraph 1, State List of the Ninth Schedule of the Federal Constitution must be decided ("mestilah diputuskan") by the Syariah High Court as provided by art. I 121(1A) of the Federal Constitution.

[11] Secondly, for an order that all proceedings in this court be stayed until the issue has been disposed of by Syariah High Court as provided by art. 121(1A) of the Federal Constitution. A

[12] The issue is simple: Is it this court or the Syariah High Court that is seized with jurisdiction to decide whether the stated provisions of the said Enactments are in accordance with the provision of the Federal Constitution? That is the net effect of the issue posed in this application. B

[13] Before this court, learned counsel for Abdul Kahar, the Senior Federal Counsel appearing for the Government of Malaysia and the State Legal Advisor appearing for the State of Selangor Darul Ehsan took a common stand that it was this court and not the Syariah High Court that has the jurisdiction to determine the issue. Learned counsel for the Majlis Agama Islam, though a Department of the Government of State of Selangor, took the opposing view. This is a very peculiar situation. Is a department of a State Government entitled to go against the stand taken by the State Government? I shall not answer that question. C D

[14] Learned counsel for Majlis Agama Islam concedes, and rightly so, that interpretation of the Federal Constitution is a matter for this court, and not the Syariah Court to decide. I have said in *Latifah bte Mat Zin v. Rosmawati bte Sharibun & Anor* [2007] 5 CLJ 253, at p. 288: E

> Interpretation of the Federal Constitution is a matter for this court, not the Syariah Court. F

[15] However, the learned counsel argued that he was not saying that it was the Syariah Court that had jurisdiction to interpret the Constitution. Neither was he saying that it was for the Syariah Court to decide whether the said provisions were consistent ("selaras") with the provisions of the Constitution or not. All he was saying was that it was for the Syariah Court to decide whether the said offences were offences against the precepts of Islam or not. Then, it is for this court to decide whether the impugned provisions are void or not. He drew an analogy with what I have said in *Latifah (supra)* where a double proceeding is necessary in a distribution petition: the syariah court determines the shares of the beneficiaries according to "faraid" and the civil court makes the distribution order accordingly. G H I

[16] Actually, that is not the case here, nor what was prayed for in the notice of motion. The motion clearly prays for an order that the issue whether the impugned provisions are consistent with precepts of Islam as provided by Paragraph 1, State List, Ninth Schedule of the Federal Constitution must be decided by the Syariah High Court as provided by art. 121(1A) of the Federal Constitution. That clearly is asking for the interpretation of the provision of the Constitution. Nowhere in the Constitution says that interpretation of the Constitution, Federal or State is a matter within the jurisdiction of the syariah court to do. The jurisdiction of syariah courts are confined to the limited matters enumerated in the State List and enacted by the respective state enactments. What happens in an administration of estate cases is different. There, while Letters of Administration is a matter within the jurisdiction of the "civil court", the Constitution also provides that "Islamic law relating to succession, testate and intestate …" is a matter within the jurisdiction of the State Legislature to make law to grant jurisdiction to the syariah court. That is followed by specific provisions in the relevant state enactment – see *Latifah (supra)*.

[17] That is not the case here. Nowhere in the Constitution is there a provision that the determination of Islamic Law for the purpose of interpreting the Federal Constitution is a matter for the State Legislature to make law to grant such jurisdiction to the syariah court. Hence, there is no such provision in the State Enactments to grant such jurisdiction to syariah courts. In fact, it cannot be done. On the other hand, item 4(k)of List I, Federal List of the Ninth Schedule goes further to provide that:

> (k) Ascertainment of Islamic Law and other personal laws for purposes of federal law.

is a federal matter.

[18] Reliance was made on the provision of art. 121(1A) of the Constitution. With respect, this article does not confer jurisdiction on syariah courts to interpret the Constitution to the exclusion of this court.

[19] As I have said a number of times, ending with *Latifah (supra)*, that provision was inserted to avoid a situation as in *Myriam v. Ariff* [1971] 1 MLJ 265, not to oust the jurisdiction of this court in matters that rightly belong to it. Before the

jurisdiction of this court is excluded, it must be shown that the Syariah Court has jurisdiction over the matter first. That is not the case here. In fact, the Constitution provides to the contrary. Article 128(1) of the Federal Constitution provides:

> 128. (1) The Federal Court shall, **to the exclusion of any other court,** have jurisdiction to determine in accordance with any rules of court regulating the exercise of such jurisdiction:
>
> (a) any question whether a law made by Parliament or by the Legislature of a State is invalid on the ground that it makes provision with respect to a matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws; and

[20] That, in effect, is what the Majlis Agama Islam is saying that Syariah High Court should determine. That is a matter for this court to decide, not the Syariah High Court. Whether the impugned provisions are within the scope that the State Legislature has jurisdiction to make or not and whether they are valid or not, will be decided when we hear the petition.

[21] I would dismiss this application and also the prayer for a stay of the proceedings before this court with no order as to costs.

[22] Both my brothers Zaki Tun Azmi, PCA and Zulkefli Ahmad Makinudin FCJ have read this judgment and agreed with it.

[23] We make the orders accordingly.